(2)

Supreme Court, U.S.
FILED
MAY 26 2004
OFFICE OF THE CLERK

No. 03-1266

In the Supreme Court of the United States

JOHN ALLEN LATON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's alleged arson of a volunteer fire department station violated 18 U.S.C. 844(i), which establishes criminal penalties for arson of "any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Belflower v. *United States*, 129 F.3d 1459 (11th Cir. 1997), cert. denied, 524 U.S. 921 (1998)	7
Benson v. *Universal Ambulance Serv., Inc.*, 497 F. Supp. 383 (E.D. Mich. 1980), rev'd, 675 F.2d 783 (6th Cir. 1982)	7
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	5
Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997)	8
Jones v. *United States*, 529 U.S. 848 (2000)	6
Russell v. *United States*, 471 U.S. 858 (1985)	6
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993)	5

Statutes:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	7
18 U.S.C. 844(i)	2, 3, 4, 5, 6, 7, 9

In the Supreme Court of the United States

No. 03-1266

JOHN ALLEN LATON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-57) is reported at 352 F.3d 286. The opinion of the district court (Pet. App. 58-68) is reported at 180 F. Supp. 2d 948.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2003. The petition for a writ of certiorari was filed on March 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted by a federal grand jury in the Western District of Tennessee on a charge of arson of a building, in violation of 18 U.S.C. 844(i). The district court dismissed the indictment, holding that the building in question was not covered by Section 844(i). Pet. App. 58-68. The court of appeals reversed. *Id.* at 1-57.

1. On March 3, 2000, the Henning Fire Station in Henning, Tennessee, was destroyed by fire. Pet. App. 2. On September 18, 2001, a federal grand jury returned an indictment charging petitioner, who was the chief of the Henning Fire Department, with arson, in violation of 18 U.S.C. 844(i). Pet. App. 2. Section 844(i) establishes criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

Petitioner moved to dismiss the indictment on the ground that the fire station was not used in interstate commerce or in an activity affecting interstate commerce. The parties stipulated to various facts about the fire station's operations. According to that stipulation, the building housed fire department equipment, most of which was purchased from out-of-state vendors, who also repaired the equipment. The building contained an office, kitchen, and meeting spaces for the Henning Volunteer Fire Department. The department has provided emergency services to several businesses, to the Henning Police Department, and to vehicles in distress on U.S. Route 51 and at the rest area on Route 51. When the fire department responds to fire calls outside the Henning city limits, the Department charges a $500

fee (recently raised from $300), which is sometimes billed directly to out-of-state insurance companies. Pet. App. 2-3, 59-60.

The parties' stipulation also showed that the department's volunteer firefighters are paid wages based on the amount of time spent at the fire scene. The total wages paid to the firefighters generally do not exceed $1000 per year. In addition, the availability of modern fire services within a particular geographic area typically affects the premiums charged by United States insurers of residential and business property. Fire insurance premiums in a community with a "good" Public Protection Classification are generally much lower than in a community with a bad classification. Pet. App. 3, 60-62.

2. The district court granted petitioner's motion to dismiss the indictment. Pet. App. 58-68. Based on the stipulated factual record, the court held that Section 844(i) was inapplicable to petitioner's alleged conduct because the fire station was not used in interstate commerce or in an activity affecting interstate commerce. *Id.* at 62-68. The court deemed it "not significant" that trucks housed at the fire station were sometimes used to extinguish fires at commercial businesses, stating that "[t]his is too attenuated a series of connections to constitute a building that is used 'in any activity affecting interstate or foreign commerce.'" *Id.* at 65. The court likewise held that the purchase of supplies from outside Tennessee, the payment of wages to the firefighters, the fees billed for out-of-city fires, and the impact on insurance rates of the fire department's operations were insufficient to establish the requisite interstate commerce nexus. *Id.* at 65-67.

3. The court of appeals reversed. Pet. App. 1-31. The court explained that numerous state and local

government buildings—"including but not limited to airports, seaports, convention centers, police departments auctioning off seized and forfeited property, health care centers, and departments of property management, economic development, and waste collection"—are engaged in activities that affect interstate commerce and are therefore covered by 18 U.S.C. 844(i). Pet. App. 14. In determining the applicability of Section 844(i), the court explained, "[e]ach piece of real or personal property, taking into account its function, must be assessed individually to determine the extent to which it impacts interstate commerce." *Id.* at 15.

The court of appeals "conclude[d] that a rational juror could find beyond a reasonable doubt that the [Henning Fire Station] was used in an activity that affected interstate commerce because its role in fighting fires constituted an active, rather than a passive, employment in interstate commerce." Pet. App. 27. The court based that assessment on a number of the facts to which the parties had stipulated. See *id.* at 27-30. The court concluded:

> The [fire station] permits local businesses to operate, enables the free flow of goods and passengers through the state of Tennessee, lowers the costs of doing business by decreasing fire insurance premiums, and directly engages in commercial transactions, in a more minor way, through the purchase of supplies and the billing of insurance companies. Accordingly, any rational juror could conclude beyond a reasonable doubt that the jurisdictional element was met here because the [fire station] is actively used in an activity that affects interstate commerce.

Id. at 30.

Judge Sutton dissented. Pet. App. 31-57. In Judge Sutton's view, petitioner's alleged conduct was not covered by Section 844(i) because "local governments build fire stations to put out fires and save lives, activities that serve distinctly intrastate public-safety objectives, not interstate commercial ends." *Id.* at 36.

ARGUMENT

Petitioner challenges the court of appeals' holding that the fire station whose arson is at issue in this case could rationally be found to be used in an activity that affects interstate commerce. Pet 3-6.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals' decision places petitioner in the same position he would have occupied if the district court had denied his motion to dismiss the indictment. If petitioner is acquitted following a trial on the merits, his contention that Section 844(i) is inapplicable to the Henning Fire Station will be moot. If petitioner is convicted of the charged offense and his conviction is affirmed on appeal, he will be entitled to re-assert his current claim, together with any other legal challenges he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

2. Section 844(i) applies to the arson of any building or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In *Russell* v. *United States*, 471 U.S. 858 (1985), this Court upheld a Section 844(i) conviction based on the attempted destruction of a two-unit apartment building used as rental property. The Court observed that "the legislative history [of Section 844(i)] suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." *Id.* at 862.

Subsequently, in *Jones* v. *United States*, 529 U.S. 848 (2000), this Court held that Section 844(i) does not cover the arson of an owner-occupied residence. The Court held that Section 844(i)'s interstate commerce element, which requires that a building be "used" in commerce or in an activity affecting commerce, "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855. In holding that the ties to interstate commerce on which the government relied—that the home was mortgaged to and insured by out-of-state companies, and that it received natural gas from outside the State—were insufficient to trigger the application of the statute, the Court explained that "[i]t surely is not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy." *Id.* at 856.

In the instant case, the court of appeals carefully analyzed this Court's decisions in *Russell* and *Jones* (Pet. App. 15-20) and correctly applied those rulings to the stipulated factual record. Contrary to petitioner's contention (Pet. 5), nothing in the court of appeals'

opinion in this case suggests that Section 844(i) categorically applies to all buildings other than owner-occupied residences. Rather, the court correctly found, based on a stipulated record detailing the characteristics and functions of a specific government building, that the activities of the Henning Fire Station affected interstate commerce in a variety of ways, and that the building therefore fell within the coverage of Section 844(i) as that statutory provision was construed in *Jones*.

As the primary emergency services provider for the stretch of U.S. Route 51 that passes through Henning, Tennessee, the fire department responds to incidents and accidents on Route 51 and at the Route 51 rest area. By "protect[ing] passenger vehicles carrying tourists and travelers voyaging through western Tennessee, [the fire department] safeguards the interstate shipment of goods, and it permits the freeflow of trucks and buses through the area." Pet. App. 29.* The fire department also facilitates commercial activity by providing firefighting services to businesses in Henning.

---

* Compare *Belflower* v. *United States*, 129 F.3d 1459, 1462 (11th Cir. 1997) (upholding a conviction under Section 844(i) for the arson of a police vehicle, on the ground that the vehicle was used in an activity affecting interstate commerce because the officer's responses to emergencies affected interstate commerce), cert. denied, 524 U.S. 921 (1998); cf. *Benson* v. *Universal Ambulance Serv., Inc.*, 675 F.2d 783, 786 (6th Cir. 1982) (private ambulance service was engaged in an activity that affected interstate commerce for purposes of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, because it "responded to emergencies on streets and highways over which flows significant commerce between the states" and "remove[d] obstructions from such streets and highways as to enable commerce to move freely") (quoting *Benson* v. *Universal Ambulance Serv., Inc.*, 497 F. Supp. 383, 385 (E.D. Mich. 1980)).

As the court of appeals explained, "[p]reventing the destruction of commercial establishments strikingly affects interstate commerce by preserving entities directly engaged in interstate commerce." *Id.* at 28.

In addition, the City of Henning charges a fee when the fire department responds to calls outside the city limits, and that fee is sometimes imposed on out-of-state insurance companies. Pet. App. 27. Although the fees charged are insufficient for the department to earn a profit, an activity can be "commercial" even if it is conducted on a nonprofit basis. See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997) ("Even though petitioner's camp does not make a profit, it is unquestionably engaged in commerce, not only as a purchaser, but also as a provider of goods and services.") (citations omitted). The fire department pays volunteers an hourly wage for the time spent responding to emergency situations. Pet. App. 27. The department also purchases goods and services, including firefighting equipment, from out-of state vendors. *Ibid.* The fire station's activities further affect interstate commerce because insurance companies take into account the availability and quality of a community's firefighting services in setting insurance rates. As the court of appeals explained, "[t]he presence of an active fire department in Henning * * * significantly impacts the insurance rates of all the businesses (and homes) in Henning, which in turn influences the commercial transactions of those businesses, both in the sense of their relationships to their insurers and their profit margins." *Id.* at 29-30.

Thus, the court of appeals did not rely on a categorical rule of any sort, but based its decision on a careful, case-specific analysis of the ways in which the activities of the Henning Fire Department affect inter-

state commerce. Petitioner identifies no court of appeals decision, before or after this Court's ruling in *Jones*, that has held Section 844(i) to be inapplicable to a building that performs comparable functions. Absent any conflict among the circuits, petitioner's claim would not warrant this Court's review even if a final judgment had been entered in the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

DEBORAH WATSON
Attorney

MAY 2004